

Newsletter

Labour Law

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PREFACE

The first issue of our 2016 Newsletter begins by examining the decision of the Rhineland-Palatinate Higher Labor Court on the permissibility of fixed-term employment contracts in the area of professional sports. The case at hand involved “Heinz Müller”, the former Mainz 05 goalkeeper. Unlike the lower court, the Rhineland-Palatinate Higher Labor Court rejected the plaintiff’s action to have his employment declared permanent thereby making it clear that fixed-term employment contracts with professional athletes for objective reasons are possible and permissible at least in the area of football.

In addition, we consider the question presented to the Federal Labor Court of whether employers may issue formal warnings to members of the works council. Finally, we turn our attention to matters of great significance in practice, namely the use of the Internet and email at work as well as the application of employment law rules to external managing directors of private limited companies. The trend here indicates that more protection is available to managing directors in this respect.



Fixed-Term Employment Allowed in Professional Soccer – For the Time Being!

Decision

In its decision of 17 February 2016 (4 Sa 202/15), the Rhineland-Palatinate Higher Labor Court reversed the decision of the Mainz Labor Court of 19 March 2015 (3 Ca 1197/14), ruling that fixed-term employment contracts with professional football players are legal.

In Heinz Müller (former goalkeeper) vs. FSV Mainz 05, the Rhineland-Palatinate Higher Labor Court ruled (at first orally) that objective reasons exist for such fixed-term contracts “due to the unique nature of the work to be performed by the plaintiff as a professional football player”, arguing that this is grounded not only in the unpredictability of athletic performance, but also in the fact that the public insists upon variety, as is also the case in the entertainment business.

Background

This is the first decision to expressly address the legality of fixed-term employment contracts with professional football players. The question as to whether such fixed-term employment is permissible has been the subject of much dispute in the scholarly literature. Those who are of the opinion that such employment is legal regularly cite the need for innovation and variety, the gradual decline in the performance of professional athletes with age and what is referred to as ‘wear’.

What that means is that fatigue and wear may occur in the case of work in the same environment and inhibit the development of athletes who are under management. The Federal Labor Court recognized the element of wear

as the reason for fixed-term employment contracts with coaches at the state and club levels in the areas of fencing and tennis and ruled such fixed-term contracts legal (Federal Labor Court, Decision of 19 June 1986 – 2 AZR 570/85; Federal Labor Court, Decision of 29 October 1998 – 7 AZR 436/97).

It remains to be seen whether the Federal Labor Court will also recognize one of the above reasons in the case of professional football players and conclude that fixed-term contracts with the latter are also legal. Heinz Müller has the possibility of appealing the decision of the second-instance court to the Federal Labor Court.

Conclusion

Professional football has not suffered any major upheaval. The clubs and the companies that employ professional football players can relax. Despite the opinion of many officials who – reasoning on the basis of the ultimate result – argue that it is simply impossible to apply ‘normal’ labor law to professional football, the legality of fixed-term contracts is not by any means anchored in doctrine although good arguments do exist for such legal treatment.

Dr. Heiko Reiter

Whatsapp, Zalando, Facebook & Co – What do Employers Have to Accept?

Introduction

Internet

Employees must, as a rule, have the permission of their employers to use Internet facilities for personal reasons while at work. Such permission will usually take the form of a clause in their employment contracts or a works agreement. However, tacit acceptance of private use by an employer may also constitute consent.

Cellphones

The principles elaborated by the Federal Labor Court governing the use of radios during working hours can be applied to the private use of cellphones at work by analogy. Employees have a duty to perform their work properly, i. e., to work in a concentrated and conscientious manner in keeping with their personal abilities. An employee who occasionally uses a cellphone for private purposes, but nevertheless performs his or her work properly, cannot be considered to be in breach of his or her contractual obligations.

However, there are circumstances that would warrant prohibition of the use of cellphones. For example, it is not acceptable to read private text messages while performing customer support and service activities.

Implications for Practice

Review

If personal use of company Internet facilities is prohibited, the employer will, as a rule, have the right to monitor Internet usage by employees to determine whether they limit their use to company business. If

personal use is allowed, monitoring of Internet use by employees is subject to restrictions grounded in the need to protect the general right of privacy of employees. This applies in particular with respect to the surveillance of email traffic.

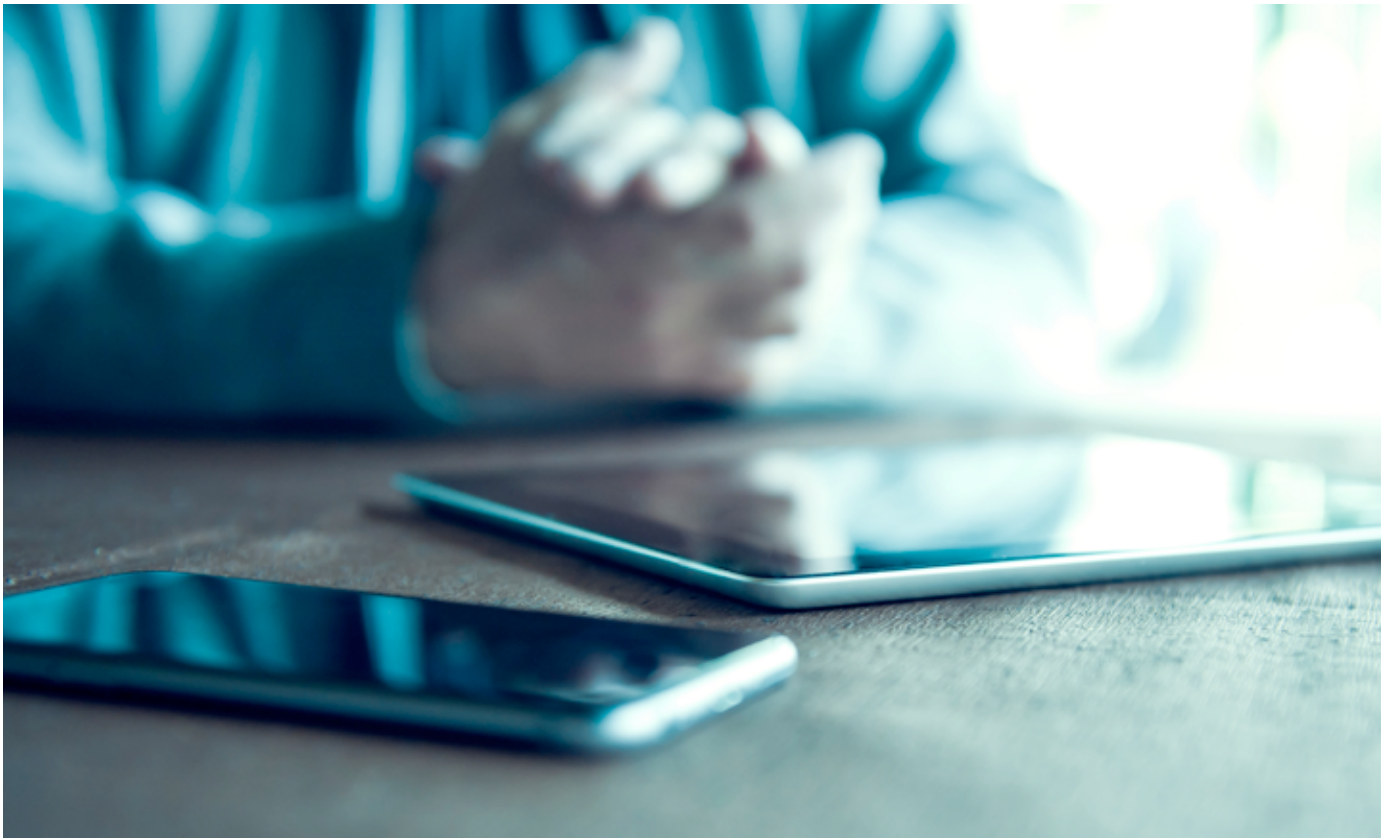
In this case, only the content of official company emails may be inspected. The use of suitable technical means to separate official and private email correspondence is therefore recommended since access to an employer's own official business correspondence would also be limited by the duty to protect general privacy.

Sanctions

Violations of company rules governing personal Internet usage or limits imposed upon such use may, depending upon the severity and duration, warrant dismissal for reasons lying in the conduct of the employee (e.g., 40 hours of private use of the Internet over a period of 30 working days).

However, it will normally be necessary to issue a formal warning and weigh the respective interests of the two parties prior to dismissal in the case of such a violation. Under exceptional circumstances, immediate termination without notice may be possible, for example, in the event of criminal behavior in connection with personal use of Internet facilities in violation of company rules (child pornography, seditious speech, defamation of the employer, etc.).

Sanctions may come into question in the case of the use of cellphones for personal reasons if an employee violates explicit rules of the employer governing such use or if the employee's performance is negatively impacted by



such use (e.g., private use of a cellphone by a surgeon during an operation). Here too, termination for reasons lying in the conduct of the employee must regularly be preceded by a written warning.

Co-determination

Rules governing the private use of Internet facilities and cellphones may require consultation with and approval by a company's works council.

Conclusion

Explicit rules governing the private use of Internet facilities and cellphones create clarity for both sides and facilitate disciplinary action by the employer in the case of abuse.

Pia Pracht

Employee Status for External Managing Directors – Coming Changes!

Since the Danosa decision of the European Court of Justice (ECJ), judgment of 11 November 2010 – C-232/09), there is more uncertainty than ever before as to whether the external managing directors of private limited companies (directors that hold no shares in the company) qualify as employees under labor law. It is to be sure impossible to make a categorical affirmation, but that does not change the fact that the status of external managing directors has changed in recent years.

In the case of the Danosa decision cited above, the ECJ ruled that a pregnant managing director may not be recalled if the decision to do so is essentially based on her pregnancy, reasoning that this would be incompatible with the principles contained in the Pregnant Workers Directive (92/85/EEC).

In two recent decisions, the ECJ pursued this line of reasoning, finding that external managing directors must be counted for the purpose of determining compliance with legal thresholds for collective redundancy (98/59/EC) (ECJ, judgment of 9 July 2015 – C-229/14 (Balkaya)) and that external managing directors can also qualify as employees within the meaning of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (ECJ, judgment of 10 September 2015 – C-47/14 (Holterman)).

What these decisions have in common is that each is based on either a directive or a regulation that defines the term ‘employee’ under European Union law. For the purposes of provisions of national law that do not implement European law, external managing directors will therefore not, as a rule, qualify as employees.

Employers would in any case be well advised to pay very careful attention to developments in the case law regarding the status of external managing directors. There is good reason to think that external managing directors of private limited companies will in the future be considered employees in other constellations involving the application of legislation protecting employee rights based on the definition of employee status under European law.

Recommended Course of Action

Before undertaking any action involving an external managing director that could have implications under labor law, it is advisable to examine carefully whether the applicable provisions of national law are intended to implement European law. If that should be the case, it is necessary to determine whether the external managing director is covered by the respective definition of employee status pursuant to European Union law.

Any error in this regard may not only render the action taken against the external managing director invalid, but in the ‘worst case’ all measures regarding other employees affected as well (e. g., in the case of failure to file proper notification of collective dismissal as required by § 17 of the Protection against Dismissal Act (Kündigungsschutzgesetz – KSchG) despite the fact that the applicable threshold is reached only after including the external managing director).

Dr. Heiko Reiter

Can Employers Issue Formal Warnings to Works Council Members?

Decision

In its decision of 9 September 2015 (Ref.: 7 ABR 69/13), the Federal Labor Court ruled on the legitimacy of a formal warning issued to the chairperson of a works council. The case addressed in the decision involved the chairperson of a works council who sent an email containing a works agreement concluded between his employer and its works council to all employees of the group to which his company belonged. The employer then issued a formal written warning to the chairperson that was entered in his personnel file.

The formal warning contained an allegation of breach of the recipient's duty of constructive cooperation and threatened application to the Labor Court for his removal from office pursuant to § 23 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) as well as his dismissal. In proceedings initiated before the labor court, the works council and its chairperson moved to have the warning removed from the chairperson's personnel file. The works council also requested that the court rule the warning null and void.

After both the Labor Court and Higher Labor Court had granted the motions of the works council, the Federal Labor Court dismissed the motion. The court granted only the motion to have the warning deleted from the personnel file of the chairperson of the works council.

The Federal Labor Court found that the very application for a declaratory judgment was inadmissible since the decision as to the validity of a warning does not involve a legal issue amenable to resolution by the Court within the meaning of § 256(1) of the Code of Civil Procedure

(Zivilprozessordnung – ZPO), but only a preliminary question, and that there were therefore no grounds for the works council's motion to have the warning removed from the personnel file of the chairperson of the works council. The Court argued that the only possible legal basis for the relief sought by the works council as a collective body, § 78 sent. 1 of the Works Constitution Act, did not apply since the right to have a formal warning expunged represented a very personal right of the respective works council member and did not accrue to any other entity.

According to the court, § 17(2) sent. 1 of the German Judicature Act (Gerichtsverfassungsgesetz – GVG) does, however, give the chairperson of a works council a personal right to have a formal warning removed from his personnel file according to §§ 242 and 1004(1) sent. 1 of the German Civil Code (Bürgerliches Gesetzbuch) regardless of whether he had breached any of his duties under co-determination law. The Court concluded that the formal warning had to be deleted from the personnel file if for no other reason than because the employer sought to sanction a breach of an official act with a threat of dismissal.

Implications for Practice

This decision of the Federal Labor Court shows once again that it is necessary to make a clear distinction between breaches of law governing co-determination and personal acts when reacting to any act of a member of a works council. An employee may be subjected to sanctions, i. e., a formal warning with the threat of dismissal or actual dismissal, only in the case of breach of duty in



the capacity as employee. According to the established case law of the Federal Labor Court, personal sanctions under employment law are on the other hand not permissible in the case of any dereliction of duty on the part of a works council member under co-determination law. The only possibility in such cases – assuming that validity of a formal warning under co-determination law is disputed – is to threaten removal proceedings under co-determination law pursuant to § 23(1) of the Works Constitution Act.

Dr. Christoph J. Müller

Possibility of Refusal to Accept Dismissal in the Absence of Explicit Authorization?

In its judgment of 24 September 2015 (Ref.: 6 AZR 492/14), the Federal Labor ruled on the question as to whether it is possible to refuse to accept dismissal pursuant to § 174 sent. 1 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) (due to the failure of the party signing the notice of dismissal to include appropriate authorization) if such authorization had already been provided previously.

In the case at hand, the legal predecessor of the defendant, represented by its current attorney of record, terminated the employment relationship with the plaintiff, a salaried attorney, in a letter dated 20 June 2012. The notice of termination was accompanied by an original counterpart of the letter authorizing the attorney of record to terminate the employment contract with the plaintiff and make any other declarations required in connection with the dismissal.

However, this initial dismissal proved to be invalid. The defendant then had the employment relationship severed again through its attorney in a letter dated 31 July 2012, but this letter only alluded to the original counterpart of the authorization letter enclosed with the initial notice of dismissal. The plaintiff refused to accept the dismissal.

The Federal Labor Court ruled that there were no grounds for refusal to accept dismissal pursuant to § 174 sent. 2 of the German Civil Code, reasoning that the plaintiff had already been adequately informed by the defendant of the fact that the attorney of record would also be authorized to continue to serve notice of dismissal in compliance with § 174 sent. 2 of the German Civil Code by virtue of the original counterpart of the authorization letter accompanying the initial notice of dismissal. According

to the Court, the fact that the necessary authorization had already been presented in connection with a previous unilateral legal act will not under normal circumstances suffice for the purposes of providing authorization as required by § 174 sent. 1 of the German Civil Code, but the provision contained in § 174 of the German Civil Code does not give the recipient any right to refuse to accept the legitimacy of the authorization.

The Court mentioned that the only possible recourse is to question the validity pursuant to § 180 of the German Civil Code in the case of any such doubt as regards the validity of the power of attorney, but the purpose of § 174 of the German Civil Code is to ensure that the recipient need not make any inquiries as to the position of the holder of the authorization or whether that party is authorized to carry out the legal act.

In summary, the Court concluded that the recipient had been adequately advised of the existence of authorization within the meaning of § 174 sent. 2 of the German Civil Code by virtue of the purpose of § 174 of the German Civil Code since the authorization letter produced with the first notice of dismissal also applied to subsequent dismissals as seen from the point of view of the recipient of the authorization.

Implications for Practice

This decision shows once again how important the provision contained in § 174 of the German Civil Code can be in practice. As the Federal Labor Court also ruled in the case of this decision, every new notice of dismissal served by an authorized party must be accompanied by the cor-

responding authorization (which will regularly be the case, for example, when the notice of dismissal is not signed by a managing director or personnel manager, but by an employee of the personnel department or the head of marketing). The dismissal is then invalid if the recipient declines to accept it.

As a result, the Federal Labor Court was able to exclude the possibility of refusal pursuant to § 174 sent. 2 of the German Civil Code in this case only because the original authorization letter was very broad. In practice, it is still always advisable to include a (new) authorization letter when repeating a dismissal.

In the case of dismissal by an authorized agent or representative, it is also always absolutely necessary to provide an original counterpart of the authorization letter and not merely a photocopy. However, if notice of dismissal is given by an officer (e. g., a managing director), the provision contained in § 174 sent. 1 of the German Civil Code does not apply, but special rules do apply in the case of civil-law partnerships.

In conclusion, it is important to keep in mind that the right of refusal pursuant to § 174 sent. 2 of the German Civil Code is precluded if, for example, the head of the personnel department serves the notice since the requisite authority usually comes with the position.

If, however, an employee should refuse to accept dismissal due to failure to provide proof of power of attorney, such refusal will be valid only if announced in a timely manner. The Federal Labor Court assumes that refusal after more than a week elapses can no longer normally be considered to have been made in a timely manner.

Finally, it is necessary to keep in mind that refusal to accept dismissal will also be invalid if notice of refusal is given by an authorized party but is not accompanied by an original of the power of attorney and the employer chooses not to acknowledge the refusal.

Dr. Christoph J. Müller

The Federal Labor Court assumes that refusal after more than a week elapses can no longer normally be considered to have been made in a timely manner.

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Note

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